priority, to waters "flowing in a river or stream or down a canon or ravine" (Cal. Civ. Code, § 1410), widely as those words have been stretched, and the doctrine of the above cases, though analogous in some of its results to appropriative as against riparian users, is not based on the statute, the court expressly declaring in the Katz case, p. 135, "There is no statute on this subject, as there now is concerning appropriations of surface streams." It is to be regretted that the author does not make more clear the exact meaning of "appropriations."

The illogical character of the principle formerly held, that valid appropriation must be made on public land (Cave *v.* Tyler, 133 Cal. 566), is well shown by Mr. Wiel, but although he notes, he fails to comment on, the view taken in a late case (Duckworth *v.* Watsonville, 150 Cal. 520), that "the right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands, the court using the expression "common law appropriation." This loses sight of the California theory of the historic basis (referred to in the opinion) of appropriation as an implied grant from the United States (Act of 1866, Rev. St. U. S. §§ 2339, 2340), and from the state by the provisions of the Code. The view is squarely opposed to all the California authorities which have passed upon this point. The qualifications, however, contained in the opinion practically confine appropriators of the class indicated to rights ripened by prescriptive user.

Mr. Wiel says that water in an artificial watercourse is personalty. This statement is certainly too broad, if not erroneous. It was contended in the case of Stanislaus Water Co. *v.* Bachman, 93 Pac. 858, that the water right only was realty; the water personalty. The decision in that case holds, "The right to have water flow from a river into a ditch is real property; and so also is the water while flowing in the ditch." This case is supported at least by Standart *v.* Round Valley, 77 Cal. 400, and Fudickar *v.* East Riverside, 109 Cal. 36, whereas the "recent case," Hesperia *v.* Gardiner, 4 Cal. App. 357, relied upon by Mr. Wiel, only actually decided that a water company could sue for water furnished to a customer from its pipes as personalty, a principle admitted by all.

The point is not wholly academic. The question of jurisdiction in suits to quiet title and of the effect of the recording acts may be involved and it is probable that water flowing in a ditch will be considered real estate for these purposes.

While the general conclusions of the author are clear and usually sound, some errors of detail have crept into the work. For instance, several cases where prescriptive right only is involved are cited to show that appropriation may be made on private land. Hildreth *v.* Montecito is cited to show that where persons separately entitled to water form a corporation to distribute it, the use is public. This was the Commissioners' decision, approved in department, reversed and decided to the contrary by the court in bank, Hildreth *v.* Montecito, 139 Cal. 22. Notwithstanding a few such defects, the work is one of great erudition and substantial value. G. H. G.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXIII. For the year 1908. Select Cases Concerning the Law Merchant. A. D. 1270–1638. Volume I. Edited for the Selden Society by Charles Gross. London: Bernard Quaritch. 1908. pp. cv, 181. 4to.

This volume contains cases from fair, staple, and tolsey courts, the local courts whose main business was the administration of the law merchant. Fourteen of these courts are represented, but five-sevenths of the cases are from the Court of St. Ives. Especial attention is given to this court in the introduction, which deals with the origin, development, and decline of the fair courts. The discussion of the law merchant itself the editor reserves for the second volume, to be made up in the main of cases taken from the King's Bench, Common Bench, and Exchequer.

There is much interesting material in the first volume. We find several illustrations of legal principles which were recognized in the royal courts only

at a much later time; for example, actions for slander (pp. 13, 17, 30, 33, 71, 84, 85); an action strongly suggestive of Lumley *v.* Gye (p. 97); action against a surety upon a simple contract (p. 117); actions by a surety against his principal (pp. 6, 48); actions for breach of contract in not shoeing a horse after entering upon the work (p. 22), or against a barber for discontinuing the treatment of the plaintiff's head (p. 36) or for not building a house of the stipulated materials, (p. 104). A breach of agreement is called a trespass on p. 49. The word covenant (*convencio*) is frequently employed, in accordance with medieval usage, in the sense of oral or unsealed agreement. Usually the judgment for the plaintiff is *in rem*, that he recover. But there are several cases (pp. 17, 22, 24, 30, 37, 48, 59) in which the judgment is *in personam*, that the defendant make satisfaction to the plaintiff. We shall hope soon to see the second volume. The material of the two volumes, supplemented by the learned editor's discussion of the law merchant, will surely be a valuable contribution to our knowledge of English legal history. J. B. A.

THE LAW OF TENDER. By George Lucas Beynon Harris. London: Butterworth and Co. 1908. pp. lxx, 415. 8vo.

As the author points out in his introductory remarks, the law of tender is adjective in its nature, accessorial to the law of obligation. As the obligations of contract became abstruse, its tenacious attendant developed correspondingly, so that the cases involving tender present a department of legal learning inevitably technical in the highest degree. Of the value of such a special book as this there can be no doubt, but it would be incomprehensible to one not intimately familiar with the substantive law upon which it depends. As to the ordinary rules stated in the chapter headings, there can be no doubt, — that tender must be fully declared and insisted upon, that it must be in lawful coin actually produced, that it must be unconditional and without reservations, that it must be kept good and produced in court, that it must be made at the right time and appropriate place, that it must be made by a proper person to a proper person. But to know what is a right time and who is a proper person one must know the law of the particular obligation in question so thoroughly that he might almost deduce the actual law of tender for his case without consulting the special cases on tender. Still, as our law is at best an imperfect science, no lawyer would be safe in trusting to his own deductions, but should have recourse to some authoritative source. It would be well if we had for our American law such an excellent special treatise as Mr. Harris has made from the English decisions. B. W.

THE JUSTICE OF THE MEXICAN WAR. By Charles H. Owen. New York and London: G. P. Putnam's Sons. 1908. pp. viii, 291. 8vo.

"The Justice of the Mexican War" cannot be considered a law book, nor is it a history; for it does not even attempt to bring men and events of earlier times to life before the reader. It deals rather with cold facts simply in their bearing upon the justice of the Mexican War. In so weighing the right and wrong of international relations it may, not inappropriately, be reviewed in this magazine. Mr. Owen's purpose is to disprove the truth of the very general statement of historians that the Mexican War was a mere trick to steal or perhaps an open stealing of territory from a weaker nation, in order to gain more states for slavery and a port on the Pacific. His arguments may be very briefly indicated as follows: (*a*) He summarizes the American character and American ideas of civil rights of the time just before the Mexican War; the character of the American settlers in Texas and their relations with people in the United States; the Mexican ideas of civil rights and particularly their control of the Texan territory. From these facts he finds that intervention by the United States in the case of Texas was far more clearly justified than in the case of Cuba, where